

## THE STATE OF NEW HAMPSHIRE

### SUPREME COURT

**In Case No. 2003-0679, Henry F. Goode, Jr. v. Michael Buckley, C.P.A. & a., the court on December 29, 2004, issued the following order:**

The petitioner, Henry F. Goode, Jr., appeals the superior court's denial of his motion for attorney's fees under RSA 91-A:8, I (Supp. 2004). We affirm.

Under RSA 91-A:8, I, attorney's fees shall be awarded if the trial court finds that: (1) "such lawsuit was necessary in order to make the information available"; and (2) "the body, agency or person knew or should have known that the conduct engaged in was a violation of [RSA chapter 91-A]." To award attorney's fees personally against a public official, the trial court must find that the official "acted in bad faith in refusing to . . . provide a public record." RSA 91-A:8, I.

The petitioner's lawsuits were indisputably necessary to make the information at issue available. On appeal, the petitioner challenges the trial court's determinations that the respondents neither knew nor should have known that they violated the statute and that co-respondent Michael L. Buckley, CPA, did not act in bad faith.

We will defer to the trial court's findings of fact unless the evidence does not support them or they are erroneous as a matter of law. Goode v. N.H. Legislative Budget Assistant, 145 N.H. 451, 455 (2000) (Goode I). The evidence supports the trial court's findings that the respondents neither knew nor should have known that they violated RSA chapter 91-A and that co-respondent Buckley did not act in bad faith. *See id.*

The trial court could reasonably have determined that before we decided Goode v. N.H. Legislative Budget Assistant, 148 N.H. 551 (2002), this court had not construed the term "work papers" as used in the statute, and the statute appeared to exempt such papers from disclosure. *See id.* at 557. The court also could reasonably have found that one definition of "work papers" included all information an auditor obtained during an audit. *See id.*; *see also Black's Law Dictionary* 1600 (7th ed. 1999). The trial court also could have rationally

**In Case No. 2003-0679, Henry F. Goode, Jr. v. Michael Buckley, C.P.A. & a., the court on December 29, 2004, issued the following order:**

Page Two of Three

concluded that it was reasonable for the respondents to rely upon this definition when construing their obligations under RSA chapter 91-A. Co-respondent Buckley testified that the generally accepted auditing standards promulgated by the federal general accounting office defined “work papers” to include all information an auditor collects, accumulates and keeps, including that which otherwise would be deemed public.

The petitioner next asserts that the trial court erroneously denied his attorney’s request to cross-examine co-respondent Buckley about the content of certain attorney-client privileged communications. He asserts that co-respondent Buckley impliedly waived the privilege by testifying that he consulted legal counsel before denying the petitioner’s 1997 information request. The petitioner contends that this testimony affirmatively placed the subject matter of these privileged communications “at-issue.” Inquiry into these conversations was necessary, he argues, to assess whether co-respondent Buckley acted in bad faith.

Under New Hampshire law, a party places the subject matter of attorney-client privileged communications at-issue only when he or she has injected privileged material into the case, such that the information is actually required to resolve the case. Bennett v. ITT Hartford Group, 150 N.H. 753, 761 (2004).

The trial court’s decision that co-respondent Buckley’s testimony did not place the content of his conversations with counsel “at-issue” is sustainable. The content of co-respondent Buckley’s conversations with counsel was unnecessary to a determination of whether he acted in bad faith.

The petitioner next contends that the trial court erroneously precluded his attorney from cross-examining co-respondent Buckley about his efforts to change New Hampshire law while this litigation was pending. He argues that co-respondent Buckley’s attempts to change the law were inconsistent with his position in the petitioner’s lawsuits. This inconsistency, he asserts, demonstrated co-respondent Buckley’s bad faith.

The determination of whether evidence is relevant is within the sound discretion of the trial court, and we will not reverse its determination absent an unsustainable exercise of that discretion. Bohan v. Ritzo, 141 N.H. 210, 217 (1996). The petitioner must demonstrate that the discretionary ruling is clearly

untenable or unreasonable to the prejudice of his case. *Id.* We hold that the trial court could reasonably have determined that co-respondent Buckley's

**In Case No. 2003-0679, Henry F. Goode, Jr. v. Michael Buckley, C.P.A. & a., the court on December 29, 2004, issued the following order:**

Page Three of Three

lobbying efforts were consistent with his view that the papers were not public and did not make it more likely that he acted in bad faith.

Affirmed.

DALIANIS, DUGGAN and GALWAY, JJ., concurred.

**Eileen Fox,  
Clerk**

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